

NO. 48730-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

MICHAEL DON OLMSTED, Petitioner

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00226-4

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RESPONSE TO SECOND SUPPLEMENTAL BRIEF

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## **RESPONSE TO SECOND SUPPLEMENTAL BRIEF**

In this, Olmsted's fourth brief in this case, he argues that the prosecutor committed misconduct during closing argument by referring to facts not in evidence. Specifically, he takes issue with the prosecutor arguing to the jury that Olmsted told his father that he lost his temper, that he "couldn't fucking stop myself," and that "they can't convict me for slapping my bitch." RP 555. Olmsted testified to making these statements. RP 424-426. Olmsted theorizes that although he admitted to saying these things during his testimony, testimony doesn't count as "evidence." Under Olmsted's theory, which he fails to support with any on-point authority, the only "evidence" that could have supported the prosecutor's remarks was a copy of the jail recordings in which he made these statements. That Olmsted admitted to making these statements during his testimony is not enough under his novel and unsupported theory of the law. This argument is meritless. The jury was instructed that "[t]he evidence you are to consider during your deliberations consists of testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted during the trial." CP 24. Thus, the jury was instructed that the term "evidence" encompasses testimony, physical exhibits, and stipulations. Olmsted cites no case which holds that a witness's testimony is not

“evidence” that may be considered by the jury. This claim should be dismissed.

Olmsted’s second claim is that he received ineffective assistance of counsel when his attorney did not lodge an objection to the prosecutor questioning him about the statements he made to his father, referenced above and found at pages 424-426 of the transcript. Olmsted theorizes that the prosecutor was precluded, as a matter of law, from questioning him about statements he made to another person unless the prosecutor could produce a physical recording of him making these statements. Olmsted cites no authority which supports this argument. Under ER 801(d)(2) the statements made by the defendant are not hearsay. There is nothing in this rule that requires that a statement made by a defendant be corroborated (either by audio recording or by the testimony of a third party) before it may be admitted into evidence. There is simply no authority to support this ridiculous theory of the law. Similarly, counsel was not ineffective during closing argument when he elected not to lodge a frivolous objection to the prosecutor referring to statements the defendant admitted to making during his testimony. This entire claim is meritless.

### CONCLUSION

The arguments made in this brief are meritless and unsupported by any authority. These claims should be dismissed.

DATED this 11<sup>th</sup> day of August, 2017.

Respectfully submitted:

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August 11, 2017 - 4:09 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 48730-6  
**Appellate Court Case Title:** Personal Restraint Petition of Michael Don Olmsted  
**Superior Court Case Number:** 13-1-00226-4

### The following documents have been uploaded:

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